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IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
and *Respondents.*

No. 75-1385

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Petitioners,

v.

LARRY G. HARDISON and TRANS WORLD AIRLINES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF CENTRAL CONFERENCE OF AMERICAN RABBIS, RABBINICAL ASSEMBLY, RABBINICAL COUNCIL OF AMERICA, UNION OF AMERICAN HEBREW CONGREGATIONS, UNITED SYNAGOGUE OF AMERICA, AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, JEWISH LABOR COMMITTEE, JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA AND NATIONAL COUNCIL OF JEWISH WOMEN, *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The undersigned, as counsel for American Jewish Committee, American Jewish Congress, Anti-Defamation League of B'nai B'rith, Central Conference of American

Rabbis, Jewish Labor Committee, Jewish War Veterans of the United States of America, National Council of Jewish Women, Rabbinical Assembly, Rabbinical Council of America, Union of American Hebrew Congregations and United Synagogue of America, respectfully moves this Court for leave to file the accompanying brief *amici curiae* in support of respondent Larry G. Hardison's claim that the statute and regulation herein challenged, which protect employees against discrimination because of their religious practices, do not violate the First Amendment to the United States Constitution.

Consent to the filing of the attached brief was sought from the parties.* Counsel for respondent Hardison and petitioner-respondent International Association of Machinists consented. Counsel for petitioner-respondent Trans World Airlines, Inc. replied that they neither consented nor opposed the motion.

The interest of the *amici* is set forth in the attached brief. All of the *amici* are national Jewish agencies having a substantial interest in civil rights generally and in the protection of the right of every American to observe and practice the requirements of his religion. Each is able to address the constitutional issue raised on this appeal in the broad context of this country's tradition of religious freedom and each respectively offers this Court its accumulated experience on the issue raised by this case.

* The letters requesting consent were sent in behalf of the Synagogue Council of America and the National Jewish Community Relations Advisory Council. This motion and brief are being filed by 11 organizations which are affiliates of those two organizations. In view of the fact that consent was withheld by one of the parties in response to the initial request, thereby necessitating the making of this motion, counsel did not deem it necessary to resubmit the request for consent on behalf of the 11 affiliates.

The *amici* request permission to submit the accompanying brief because they believe that this case presents a serious challenge to measures taken by the Federal Government to prevent a recognized evil—economic pressure on individuals to violate religious commands which their consciences require them to obey. The *amici* believe that their experience enables them to make a contribution to the consideration by this Court of this important challenge.

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
Interest of the *Amici*	2
Constitutional and Statutory Provisions and Regulations Involved	3
The Question to Which This Brief Is Addressed	4
Statement of the Case	5
Summary of Argument	7
Argument	8
Point One—The challenged statute and guideline do not violate the Establishment Clause	8
A. The statute and guideline have a substantial secular purpose	8
B. The primary effect of the 1972 amendment and the 1967 guideline is not to advance religion but to protect the equal employment opportunity of those who observe a day other than Sunday as their holy day of rest	12
C. The Statute and Guideline do not patently require pervasive and excessive government entanglement with religion	18
D. Consistent governmental practice, federal, state and municipal, supports the constitutionality of the challenged statute	21
Point Two—The challenged statute and guideline are necessary and proper measures for the enforcement of the Free Exercise Clause of the First Amendment	23
Conclusion	29

TABLE OF AUTHORITIES

PAGE

Cases:

Abington School District v. Schempp, 374 U.S. 203 (1963) 9
Arlan's Department Store v. Kentucky, 371 U.S. 218 (1962) 12

Board of Education v. Allen, 392 U.S. 236 (1968) 8
Braunfeld v. Brown, 366 U.S. 599 (1961) 11

Claybaugh v. Pacific Northwest Bell Telephone Co., 365 F. Supp. 1 (1973) 10
Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 9
Consolidated Edison Co. v. Labor Board, 305 U.S. 197 (1938) 6
Cruz v. Beto, 406 U.S. 939 (1972) 20
Cummins v. Parker Seal Company, 516 F. 2d 544, aff'd —— U.S. ——, 97 S. Ct. 342 (1976) 10

Engel v. Vitale, 370 U.S. 421 (1962) 22
Epperson v. Arkansas, 393 U.S. 97 (1968) 9

Girouard v. United States, 328 U.S. 61 (1946) 11

Hunt v. McNair, 413 U.S. 734 (1973) 9

Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 1276 (E.D. La. 1969) 10
Jenison, In re, 375 U.S. 14 (1963) 26
Jordan v. North Carolina National Bank, 399 F. Supp. 172 (W.D.N.Y. 1975) 27

Lemon v. Kurtzman, 403 U.S. 602 (1971) 9
Lemon v. Sloan, 413 U.S. 825 (1973) 9

PAGE

Marsh v. Alabama, 326 U.S. 501 (1946) 24, 25
McCollum v. Board of Education, 333 U.S. 203 (1948) 22
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 27
McGowan v. Maryland, 366 U.S. 420 (1961) 8
Meek v. Pittenger, 421 U.S. 349 (1975) 8

Parker Seal Company v. Cummins, —— U.S. ——, 97 S. Ct. 342 (1976) 3

Reid v. Memphis Publishing Co., 468 F. 2d 346 (6th Cir. 1972), aff'd after remand, 521 F. 2d 512 (1975) 10
Riley v. Bendix Corp., 464 F. 2d 1113 (5th Cir. 1972) 10

Shaffield v. Northrop Worldwide Aircraft Services, Inc., 373 F. Supp. 1284 (1974) 10
Sherbert v. Verner, 374 U.S. 399 (1963) 26, 28, 29

Tilton v. Richardson, 403 U.S. 672 (1971) 8

United States v. Ballard, 322 U.S. 78 (1944) 18, 20
United States v. Kahane, 396 F. Supp. 687 (E.D.N.Y. 1975), aff'd 527 F. 2d 492 20
United States v. Seeger, 380 U.S. 163 (1965) 17, 18

Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970) 9, 17, 21
Wisconsin v. Yoder, 406 U.S. 205 (1972) 17, 20, 26

Zorach v. Clauson, 343 U.S. 306 (1952) 9, 12, 16

PAGE

Statutes:

Civil Rights Act of 1964, §701(j) (42 U.S.C. §2000e (j)) 4, 9, 23, 29
Civil Rights Act of 1964, §703(a), 42 U.S.C. §2000e-2(a) 3, 5, 24, 25
Conn. Gen. Stat. §5-250(c) 21
Equal Employment Opportunity Commission Guideline 1605.1 (29 C.F.R. §1605.1) 4, 23, 25, 29
Fla. Stat. Ann. §231.40(1)(c) 21
N.J. Rev. Stat. 11:14-8 21
N.J. Stat. Ann. §18.14-92.2 23
N.Y. Civ. Serv. Rules and Regs. §21.6 21
N.Y. Educ. Law §3210 (1)(6) 23
Universal Military Training and Service Act, Section 6(j), 50 U.S.C. App. 456(j) 20
U.S. Constitution, Article I, Section 18 ..... 7, 23
42 U.S.C. §300a-7 15

Miscellaneous:

118 Cong. Rec. H. 1861-62 11
Pfeffer, *The Supremacy of Free Exercise*, 61 Georgetown L. Rev. 1115 (1973) 26

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Interest of the *Amici*

This brief is submitted on behalf of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations; and

United Synagogue of America, representing the Conservative congregations;

and on behalf of the following national Jewish organizations:

American Jewish Committee

American Jewish Congress

Anti-Defamation League of B'nai B'rith

Jewish Labor Committee

Jewish War Veterans of the United States of America

National Council of Jewish Women

Our interest in the cases before this Court is two-fold. In the first place, respondent Hardison, like members of the Jewish faith, observes the seventh day of the week as his Sabbath and refrains from all secular business and labor on that day. Without the protection accorded by the Congressional enactment and regulation challenged in this case, the conscientiously observant employee would be forced to violate a major tenet of his faith in order to secure gainful employment.

However, our concern extends beyond the interests of the particular parties to this litigation. We would be just as concerned even if respondent Hardison were not an observer of the seventh day of the week as the Sabbath. We would be and are concerned because we are committed to the principle of the free exercise of religion and the right of all persons to the full protection of that principle.

For these reasons, these organizations joined in a brief *amici curiae* filed, with the consent of the parties, in this Court in the case of *Parker Seal Company* v. *Cummins*, —— U.S. ——, 97 S. Ct. 342 (1976), which raised the same issues as those raised in this case, and submit to the Court this brief in the present case.

Constitutional and Statutory Provisions and Regulations Involved

The First Amendment to the Constitution provides, in part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .

Section 703(a) of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e-2(a)) provides:

> It shall be an unlawful employment practice for an employer—(1) to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . .

Acting under this provision, the EEOC, in 1967, adopted Guideline 1605.1 (29 C.F.R. Section 1605.1), which provides:

> [S]ection 703(a)(1) of the Civil Rights Act of 1964 . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.
>
> [T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

In 1972, Title VII of the 1964 Civil Rights Act was amended by adding the following language as Section 701(j) (42 U.S.C. Section 2000e(j)):

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The Question to Which This Brief Is Addressed

This brief is addressed to the single question of the constitutionality, under the First Amendment, of Section 701(j) of the Civil Rights Act of 1964 (and the regulation that preceded it), which defines "religion," as used in the section of that Act forbidding discrimination in employment because of religion, to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accom-

modate to an employee's religious observance or practice without undue hardship on the conduct of the employer's business."

The question encompasses constitutionality in respect not only to the employer, but also to labor unions claiming that the statutorily prescribed accommodation violates collective bargaining agreements.

Statement of the Case

This proceeding was initiated by respondent Hardison, a member of a seventh-day sect, the Worldwide Church of God, after he was discharged by petitioner Trans World Airlines, Inc. (hereinafter TWA) because he refused to work on Saturdays. After the discharge, Hardison filed an unlawful employment practice charge with the United States Equal Employment Opportunity Commission, which deferred to the Missouri Commission on Human Rights. On February 10, 1972, when all administrative procedures had been exhausted, Hardison filed this suit against TWA and the three unions (hereinafter IAM) who are petitioners herein in the United States District Court pursuant to 42 U.S.C. Section 2000e-2. He contended that all the defendants had practiced religious discrimination and, in addition, that the unions had violated their duty of fair representation. Following a trial, primarily on stipulated facts, judgment was entered for all defendants on the ground that each had attempted a reasonable accommodation of plaintiff's religious needs, as required by the controlling statutes and guidelines, and that undue hardships would have resulted from any greater efforts.

The Court of Appeals for the Eighth Circuit, without dissent, reversed as to TWA but affirmed as to the defendant unions. In respect to TWA, it held that it had engaged in religious discrimination by breach of its duty to make a reasonable accommodation to the religious needs of Hardison through feasible affirmative action and accordingly remanded the cause to the District Court for a determination of appropriate relief.

In respect to the defendant unions, it affirmed the judgment of dismissal, holding that, while in a proper case a union may be held to a duty of reasonable accommodation, Hardison had not directly challenged the District Court's finding that the duty to accommodate in this case did not require unions to ignore their seniority system and that the efforts of the unions in behalf of Hardison did not violate their duty of fair representation. It reserved for future cases the effect of a union's refusal to modify its employee seniority rights when no other accommodation can be accomplished without undue hardship to the employer's business. Notwithstanding this decision in their favor, the unions have petitioned for (and been granted) certiorari on the authority of *Consolidated Edison Co.* v. *Labor Board,* 305 U.S. 197, 232-234 (1938).

Both the District Court and the Court of Appeals rejected the claim presented by the petitioners herein that the statute and the regulation on which it was based violated the Establishment Clause of the First Amendment.

Summary of Argument

I. The challenged statute and guideline do not violate the Establishment Clause of the First Amendment since they have a clearly recognizable secular purpose, their primary effect is neither to advance nor inhibit religion, and neither the statute and guideline nor their administration involve excessive government entanglement with religion. By statute and practice, the Federal Government and many state and municipal governments have long done and now do exactly what the challenged measures mandate and it is inconceivable that during this period they all have been violating the Establishment Clause.

The same factors which require a determination in favor of the constitutionality of the challenged statute and guidelines in respect to the employer are equally applicable in respect to the labor unions. The requirement, imposed by both the Executive and Legislative branches of our government, to make reasonable accommodations to the religious needs of employees, would be of no more than illusory value if it could be nullified by the veto of labor unions.

II. Not only do the challenged statute and guideline not violate the Establishment Clause but their validity can be sustained under the "necessary and proper" clause of Article I, Section 18, of the Constitution, as applied to the Free Exercise Clause of the First Amendment.

ARGUMENT

POINT ONE

The challenged statute and guideline do not violate the Establishment Clause.

In *Meek* v. *Pittenger,* 421 U.S. 349, 358 (1975), this Court expressed the three-part test for validity of a statute challenged under the Establishment Clause. "First," it said, "the statute must have a secular legislative purpose. Second, it must have a primary effect that neither advances nor inhibits religion. Third, the statute and its administration must avoid excessive governmental entanglement with religion." Petitioners claim that the statute and regulation challenged herein fail under each of these tests. We believe there is no validity to this claim in respect to any part of the three-pronged test.

A. The statute and guideline have a substantial secular purpose.

In respect to the first of these prongs, we note that this Court has never found any statute enacted by Congress to be lacking a substantial secular purpose and only twice has it made such a finding in a challenge to a state statute. The claim of illegitimacy of purpose has been made often but, with the two exceptions, it has consistently been rejected. *McGowan* v. *Maryland,* 366 U.S. 420, 449 (1961) (Sunday closing law); *Tilton* v. *Richardson,* 403 U.S. 672, 678-79 (1971) (inclusion of church-related colleges under the Higher Education Facilities Act of 1963); *Board of Education* v. *Allen,* 392 U.S. 236, 243 (1968) (aid to parochial

schools); *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-13 (1971) (same); *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756, 773-74 (1973) (same); *Lemon* v. *Sloan,* 413 U.S. 825, 829-30 (same); *Hunt* v. *McNair,* 413 U.S. 734, 741-42 (1973) (aid to church-related colleges); *Walz* v. *Tax Commission of the City of New York,* 397 U.S. 664, 672-73 (1970) (tax exemption for houses of worship).

The two exceptions are *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) (law requiring Bible reading in public schools), and *Epperson* v. *Arkansas,* 393 U.S. 97 (1968) (law banning teaching of evolution in public schools). Both of these cases involved affirmative religious intrusions into the public schools. Neither involved excusing children from school attendance on their Sabbath or holy days. That the Court has not questioned the constitutionality of such excusals is strongly suggested by *Zorach* v. *Clauson,* 343 U.S. 306, 313 (1952), which is far more apposite to the present case than *Abington* and *Epperson.*

With all due respect, the claim that the challenged statute lacks a secular legislative purpose borders on the frivolous. The logic of the claim is that any statute or constitutional provision seeking to protect the free exercise of religion, logically including the Free Exercise Clause of the First Amendment itself, lacks a secular purpose.

The only evidence submitted by petitioners in either case to support this claim are remarks made by Senator Randolph in 1972 in sponsoring the amendment to the 1964 Act that became Section 701(j) (TWA Brief, pp. 37-39;

IAM Brief, pp. 43-46). The remarks quoted in these briefs, in the total context of the legislative history, hardly support the claim. Indeed, they reflect a profound concern for protecting the religious liberty of those observing a day other than Sunday as their holy day of rest.

But there is a more serious flaw in petitioners' argument. As petitioners recognize in their briefs, respondent's claim arose before the 1972 amendment was adopted and accordingly was governed by the law at the time he was discharged. The 1972 amendment is practically a verbatim incorporation of the relevant 1967 guideline. Accordingly, petitioners argue, as indeed they must, that the 1967 guideline upon which respondent's claim was initially based was itself lacking a secular purpose. The Federal District Courts and Courts of Appeal passing upon claims under the guideline identical with that of the respondent herein had no difficulty regarding its constitutionality. *Jackson* v. *Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276 (E.D. La. 1969); *Riley* v. *Bendix Corp.*, 464 F. 2d 1113 (5th Cir. 1972); *Reid* v. *Memphis Publishing Co.*, 468 F. 2d 346 (6th Cir. 1972), *aff'd after remand*, 521 F. 2d 512 (1975); *Cummins* v. *Parker Seal Company*, 516 F. 2d 544, *aff'd* —— U.S. ——, 97 S. Ct. 342 (1976); *Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 365 F. Supp. 1 (1973); *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 1284 (1974).

The purpose of the 1972 amendment is quite obvious—and plainly secular. It was not to change existing law but to codify it. Its specific purpose was to remove the doubts as to EEOC's statutory authority to issue the very guide-

line upon which respondent herein based his claim in the first instance. See 118 Cong. Rec. H. 1861-62.

An analogous situation was the enactment by Congress in 1952 of a provision in the Immigration and Nationality Act codifying the decision of this Court in *Girouard* v. *United States*, 328 U.S. 61 (1946), which had held that the existing law did not bar naturalization of religious pacifists. The only difference between the two situations is that, in the present case, Congress sought to codify a number of consistent District Court and Court of Appeals decisions rather than a single decision of this Court. We suggest that this difference hardly supports a claim that the purpose of the 1972 amendment was purely sectarian.

In support of their position, petitioners in both cases rely particularly on the cases upholding the constitutionality of compulsory Sunday closing laws even when enforced against persons whose religious convictions forbid them to keep their stores open on Saturday (TWA Brief, p. 27; IAM Brief, pp. 49, 65, 75, 78). However, in the plurality opinion in *Braunfeld* v *Brown*, 366 U.S. 599 (1961), upon which petitioners in both cases place most reliance, Chief Justice Warren noted that a number of states provide by statute for an exemption for Sabbatarians "and this may well be the wisest solution to the problem" (at p. 608). Here, Congress has done exactly that. Petitioners' claim that it may not constitutionally do so is plainly inconsistent with Chief Justice Warren's opinion. In this respect, it is pertinent also to note that efforts to challenge the constitutionality of such exemption statutes on the same ground as that asserted by the petitioners in the present case, that is that they constitute perferential treatment of Sabba-

tarians in violation of the Establishment Clause, have consistently been rejected. See, *e.g., Arlan's Department Store* v. *Kentucky,* 371 U.S. 218 (1962).

B. The primary effect of the 1972 amendment and the 1967 guideline is not to advance religion but to protect the equal employment opportunity of those who observe a day other than Sunday as their holy day of rest.

The immediate obvious effect of the challenged statute and guideline, we submit, is not to advance religion but to relieve to some extent (*i.e.,* where the relief would be reasonable and would not impose undue hardship on the employer) the economic burden borne by a minority of Americans by reason of their faithful adherence to religions which do not conform to the majority's belief as to which day of the week God commanded abstention from labor. (As we seek to show below, the relief actually extends to a much broader class.) Of course, of those relieved by the statute and guideline from being required to go to work on Saturdays, some may attend church or synagogue on that day where otherwise they would be at work. But this, we suggest, is a slim reed to support a contention that this Court should nullify an act of the Congress, particularly one which does no more than codify existing practices of the Executive Department.

In *Zorach* v. *Clauson,* 343 U.S. 306 (1952), this Court upheld the constitutionality under the Establishment Clause of a law permitting the release of public school pupils if and only if they used the released period to participate in religious instruction. That law advanced religion

far more than one that simply excused children from attending public schools on their days of religious observance, which would be the equivalent of the law and guideline challenged in the present suit. Nevertheless, the Court upheld the constitutionality of that law on the ground that its primary purpose and effect were not to advance religion but to accommodate the school attendance law to the religious needs of the children and their parents.

(Parenthetically, we note that the concern of TWA that affirmance herein "could encourage members to take advantage of the accommodation requirement to help assure larger church attendance and correspondingly fuller collection plates" (TWA Brief, p. 41, fn. 24), is hardly relevant in respect to the many Orthodox and Conservative Jews for whom we speak, since the same Mosaic law which forbids them to work on Saturdays also forbids them to carry or handle money on that day.)

The crux of the petitioners' complaint in both cases is that "the accommodation requirement, as construed by the court of appeals, gave Hardison special preference *solely* because of his religion." (TWA Brief, p. 40. Emphasis in original.) In respect to this claim, some comments are in order. In the first place, the statutory coverage is not limited to those who observe the Sabbath on Saturday. The statute does not mention Saturday. It applies equally to Moslems, whose Sabbath is Friday and to those sects or even individuals who may genuinely believe that Monday or Tuesday or any other day of the week is the divinely commanded day of rest. Indeed, and perhaps more important, it applies to Sunday-observing Christmas employed by a

Sabbatarian in a state which does not have a Sunday closing law, or in any of the many industries and other enterprises that are permitted to operate seven days a week.[1]

In the second place, because most states do have Sunday closing laws or do close on Sundays because of collective bargaining factors, the owner's personal religious predilections, or similar reasons, the primary effect of the statute is not to advance the religion of Saturday-observers but is rather to equalize or, more accurately, to diminish to some extent the inequality between adherents of the majority religion and those of minority faiths.

Finally, the statute is not limited to abstention from work on Saturdays. It applies equally, for example, to Catholic and many non-Catholic physicians, nurses and other hospital employees who for religious reasons refuse to participate in an abortion procedure, to the pharmacy sales clerk who for religious reasons will not sell contraceptives, to hospital employees who as members of the Jehovah's Witnesses sect refuse for religious reasons to participate in a blood transfusion procedure or who, if school employees, refuse to salute the flag or pledge allegiance to it, to the Quaker civil service employee in a state which imposes an oath of office but does not permit an affirmation in lieu thereof, and most aptly to the conventional Sunday-observing Christian who happens to be employed by a Sabbatarian or by an employer who, like the petitioner in the present case, keeps his business open seven

1. The *New York Times,* on page D 5 of its issue of January 28, 1977, reports that a department store employee filed charges of unlawful discrimination by reason of his dismissal for refusing to work on Sunday in violation of his religious beliefs.

days a week. Without expressing an opinion one way or the other on whether these persons should be protected from dismissal (*cf.* 42 U.S.C. Section 300a-7, which gives certain protections to persons having religious scruples concerning sterilization and abortion), we submit that their obvious inclusion in the challenged statute and guideline negates the contention that the purpose and/or primary effect of the statute and guideline is to advance the religion of those who, like respondent herein, observe a day other than Sunday as their divinely ordained day of rest.

In all these instances and others that could be cited, the statute and guideline benefit not a narrow class but a class which in one instance or another may encompass a majority of Americans. However, even if the purpose of the challenged statute were to benefit a narrow class, that would hardly require its invalidation. The very purpose of the Establishment Clause, and of the Free Exercise Clause as we will shortly indicate, is to benefit narrow classes. No First Amendment is needed to protect members of large, conventional religions.

Finally, we submit that petitioners are in error in relying on this Court's decisions forbidding governmental financial aid to religious schools. Those decisions forbid the state to pay for educational services which it may itself not constitutionally furnish. The statute challenged here makes no such demand. It does not compel the employer to pay for services which, by reason of his religious convictions, the employee may not furnish or which, because of the First Amendment, the employer may not accept. If a Sabbatarian performs only four days' service weekly,

the statute does not compel the employer to pay him for five. (Indeed, in the present case, Hardison did offer an appropriate reduction in pay for his Sabbath absence but it was TWA which rejected the offer.) And, if the employee's absence from work on his Sabbath causes undue hardship on the conduct of the employer's business, the employer may lawfully discharge him. The religious school aid decisions forbid government to finance the operation of religious educational institutions. No religious institution, educational or otherwise, is financed directly or indirectly by the operation of the statute and guideline challenged herein.

Note should also be taken of the assertion in the IAM brief (at p. 50) that five of the "evils" against which the Establishment Clause was fashioned are furthered by the decision of the Court of Appeals in the present case. These are: "(1) discriminatory preference of religious over secular reasons for absence from work; (2) facilitation of religious activity for its own sake, by removal of non-discriminatory work-barriers; (3) taxation to support religious activity by imposing forfeiture of rights, expense and hardship upon others; (4) entanglement of employers, unions, a government agency and the courts in determination of religious questions; and (5) division of the work force politically along religious lines."

In respect to the first of these assertions, we need only refer to *Zorach* v. *Clauson,* 342 U.S. 306 (1952), in which the Court upheld the constitutionality of a law providing for the release of public school pupils from part of their regular school time to participate in religious, and only in

religious not secular, instruction off public school premises, and to *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), in which the Court held that students had a constitutional right to abstain from compulsory secondary schooling for religious and only religious reasons.

In respect to (2), we need only note that if facilitation of religious activity is either the purpose or effect of the statute and regulation challenged herein, it is only indirectly and minimally so. Nothing in them requires Hardison to go to church on Saturday; he can sit home and watch television all day if his religious commitment permits him to do so. Moreover, there is far more in the statute and regulation than abstention from work on Saturdays; nonparticipation in an abortion or blood transfusion procedure, for example, in no way facilitates religious activity.

In respect to (3), far more substantial "forfeiture of rights, expense and hardship" is imposed, for example, upon non-religious objectors to military service by reason of the exemption, upheld in *United States* v. *Seeger,* 380 U.S. 163 (1965), accorded to religious objectors; or upon real property owners who must make up in their taxes for the exemption accorded church properties, an exemption held not violative of the Establishment Clause in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970). In any event, the statute and regulation in issue here specifically provide that the accommodation must be made only if it can be done without "undue hardship to the conduct of the employer's business."

In respect to (4), we see no entanglement by employers, unions or government agencies in any religious questions. The only question to be decided by anybody, including a court of law, is not the theological or doctrinal validity of the claim but the *bona fides* of the claimant. The constitutional competency of our courts to make such a determination is hardly open to question. *United States* v. *Seeger,* 380 U.S. 163 (1965); *United States* v. *Ballard,* 322 U.S. 78 (1944).

Finally, in respect to (5), it should be noted again that the challenged statute and regulation do not protect only a small sect of seventh-day observers but in one way or another may very well protect the majority of Americans, including those who for reasons of religious conscience will not work on Sundays; will not participate in birth prevention procedures or blood transfusions, or engage in a variety of other employment activities contrary to their sacred beliefs.

C. The Statute and Guideline do not patently require pervasive and excessive government entanglement with religion.

Whenever a governmental body is required to pass on a religion-based claim, some entanglement with religion is unavoidable. Were that entanglement fatal, no law exempting religious institutions from taxation would be constitutional. All religious incorporation laws would be invalid. Laws forbidding the sale of alcoholic beverages within specific distances of houses of worship would be unconstitutional, for in each case the governmental body mandated to enforce the law would be forbidden to determine whether

the claimant for protection was truly a house of worship. Laws exempting Christian Scientist and other practitioners of faith healing from laws regulating medical practice could not stand. Public school children could not be released for religious instruction since the school authorities could not determine whether the instruction was truly religious. Military chaplaincies could be outlawed, for the military authorities would be barred from passing judgment on whether the applicant was truly a chaplain and, if so, whether he was a competent one. Ministers could not be exempt from military or jury service. "Church Entrance —No Parking" signs would have to be removed. And innumerable other instances of legal determinations of claims based upon religion would have to be discontinued.

It is for this reason that the third prong of the test upon which petitioners rely mandates only *excessive* government entanglement with religion. A statute which seeks to forbid discrimination in employment because of religion necessarily imposes upon governmental agencies, whether judicial or administrative, the obligation to determine whether a claim asserted thereunder is made in good faith, and a review of the claim for that purpose can hardly be held to entail forbidden excessive entanglement.

On page 42 of its brief, TWA contends that the statute and regulation mandate unconstitutional excessive governmental entanglement with religion because "those enforcing the requirement will necessarily weigh and determine whether an individual has a religious belief, whether it is sincerely held and how that belief is manifested in the employment relationship."

Acceptance of this contention, we submit, would make an absurdity of the Free Exercise Clause, for it would mandate acceptance of any claim, no matter how frivolous, or rejection of all claims, no matter how sincere, made thereunder. More than three decades ago, it was held by this Court in *United States* v. *Ballard,* 322 U.S. 78 (1944), that it is constitutional to allow a jury, in a prosecution for obtaining property under false pretenses relating to religion, to decide whether the defendants believed in the truth of the representations they made. In many thousands of cases, Selective Service boards have been required under Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. 456(j), to pass on the sincerity of claims to a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." In *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), this Court upheld the right of parents under the Free Exercise Clause to withhold their children from attendance at secondary schools if they sincerely believed that their religious conscience would be violated by allowing them to attend. In *Cruz* v. *Beto,* 406 U.S. 939 (1972), this Court held that the Free Exercise Clause protected a prisoner's right to participate in religious services. See also *United States* v. *Kahane,* 396 F. Supp. 687 (E.D.N.Y. 1975), *aff'd,* 527 F. 2d 492 (prisoner's right to nutritionally adequate food which is compatible with religious dietary restrictions).

In all of these situations, and many others, acceptance of the constitutional claim depends on a judgment as to the sincerity of the asserted religious belief.

D. Consistent governmental practice, federal, state and municipal, supports the constitutionality of the challenged statute.

In *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), this Court held that the practical universality of tax exemption for religious institutions is strong evidence of its constitutionality. While the practice of arranging the working schedule of governmental employees who are Sabbatarians so as not to compel them to violate their religious obligations may not be quite as universal as tax exemption for churches, it is sufficiently widespread to present strong evidence of its constitutionality. See, *e.g.,* Conn. Gen. Stat. §5-250(c); Fla. Stat. Ann. §231.40(1)(c); N.J. Rev. Stat. 11:14-8; N.Y. Civ. Serv. Rules and Regs. §21.6. Generally, only where the employee's seven-day availability for service is critically important to the performance of his duties—the functional equivalent of "undue hardship on the conduct of the employer's business" in the statute challenged herein—is a Sabbatarian compelled to choose between the loss of his position or the violation of his religious obligation.

Government, under our system, must act in accordance with law, and the Constitution is the supreme law of the land. If it is a violation of the Establishment Clause for the government to require other employers to make reasonable accommodations so as not to compel their employees to violate their religious obligations by working on their holy day of rest, it is no less a violation if the government, as employer itself, makes such accommodations.

It is no answer that the accommodation made by the government does not injure anyone whereas, if it is made

by a private employer, he and/or the Sabbatarian's fellow employees may be injured by it. Under the statutory provision challenged herein, the Sabbatarian employee is not entitled to relief if accommodation would be unreasonable or would cause undue hardship on the conduct of the employer's business. Conversely, it can hardly be urged that the exemption from military service enjoyed by clergymen and religious objectors to military service does not injure far more seriously those draftees who otherwise would not have been called to service.

Nor is it a sufficient answer that the government acts voluntarily whereas the private employer acts under compulsion of statutory law. In the first place, it is doubtful that, in our political system, any action of government can be said to be truly voluntary and not under compulsion of law. Secondly, whatever the case may be under the Free Exercise Clause, the voluntariness of the challenged action is irrelevant in judging whether it is violative of the Establishment Clause. (See *Engel* v. *Vitale,* 370 U.S. 421, 423, 430 [1962], where it was held that neither the fact that introduction of prayer recitation in public schools was voluntary on the part of a school board nor the fact that participation by the pupils was likewise voluntary immunized the practice from successful challenge under the Establishment Clause. To the same effect, see *McCollum* v. *Board of Education,* 333 U.S. 203 [1948]). Finally, in many cases the government, federal, state or municipal, does act in compliance with statutory law, as when it accords exemption from military service to religious pacifists, or provides for absentee voting when a primary or election day falls on

a religious holiday, or exempts from the sanctions of the compulsory school attendance law those children whose absence is dictated by the fact that a particular school day falls on a holiday sacred to them. See, *e.g.,* N.J. Stat. Ann. §§18.14-92.2; N.Y. Educ. Law §3210(1)(6).

Concluding this part of our brief, we urge that there is no validity to the claim that either Section 701(j) of the Civil Rights Act of 1964 or Guideline 1605.1 of the United States Equal Employment Opportunity Commission which preceded it, violates the Establishment Clause of the First Amendment to the Constitution.

POINT TWO

The challenged statute and guideline are necessary and proper measures for the enforcement of the Free Exercise Clause of the First Amendment.

The First Amendment bars not only laws respecting an establishment of religion but also measures that prohibit its free exercise. While we do not have in this case a statute or other formal governmental regulation forbidding an employer from making a reasonable accommodation to an employee's religious observance or practice, we believe that enactment of the statute challenged here was within the power of Congress, under the Necessary and Proper Clause of Article I, Section 8, of the Constitution, to carry out the provisions of the Free Exercise Clause of the First Amendment.

Preliminarily, it should be noted that, as petitioners concede, Congress had clear power, under the Commerce

Clause, to enact that part of the 1964 Civil Rights Act (Section 703(a)(1)) which forbids discriminatory employment practices on the basis of religion. The power of Congress under the Commerce Clause to enact Section 701(j), we submit, is equally clear.[2] Petitioners are in effect arguing here that this Court must restrict Congress' powers under the Commerce Clause in order to prevent an impairment of the Religion Clause. We suggest that, on the contrary, this Court may and should uphold the statute as a proper exercise of Congressional powers under both clauses. Such a result would be in harmony with the principle that the courts should read constitutional commands in a way that makes them consistent with each other rather than in a way that would require the sacrifice of one in order to carry out the other.

The power of Congress to act affirmatively to protect freedom of religion was strongly suggested by this Court in *Marsh* v. *Alabama,* 326 U.S. 501 (1946). The Court there held that, under the Free Exercise Clause, a company wholly owning a town could not bar colporteurs from distributing religious tracts on its streets. In reaching that result, the Court specifically suggested (although Justice Frankfurter expressed the view [at p. 511] that it was not necessary to do so) that the same result could have been reached by Congressional action under the Free Exercise Clause. It said (p. 507, n. 4):

> And certainly the corporation can no more deprive people of freedom of press and religion than it can

2. We do not, of course, suggest that, if Section 701(j) violates the Establishment Clause, it may nevertheless be upheld under the Commerce Clause. We believe we have shown, in Point One above, that it does not.

> discriminate against commerce. In his dissenting opinion in Jones v. Opelika, 316 U.S. 584, 600, ... which later was adopted as the opinion of the Court, 319 U.S. 103, 194, ... Mr. Chief Justice Stone made the following pertinent statement: "Freedom of press and religion, explicitly guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate commerce. Whatever doubts may be entertained as to this Court's function to relieve, *unaided by Congressional legislation,* from burdensome taxation under the commerce clause, ... it cannot be thought that that function is wanting under the explicit guaranties of freedom of speech, press and religion." (Emphasis added.)

The power of Congress to protect interstate commerce from interference, by burdensome taxation or otherwise, extends to interference by private enterprises like petitioner as well as to interference by states. In the present case, Congress *has* enacted legislation of the kind suggested in *Marsh.* What we are here suggesting is that that action can be viewed as an exercise of the Congressional powers under both the Commerce and Free Exercise Clauses.

We do not urge, nor is it necessary for this Court to decide that, if Section 703(a)(1), the EEOC Guidelines and the 1972 amendment had not been adopted, an employer would nevertheless be prohibited from barring Sabbatarians from employment by virtue of the Free Exercise Clause alone. We submit only that the Necessary and Proper Clause, invoked under the Free Exercise Clause, empowers Congress and the EEOC to adopt the statute and regulations that are challenged here. Just as this Court

found in *Marsh* that the predominant position of the company in the town required applying the protections of the Free Exercise Clause, Congress could properly find that the power of employers operating in interstate commerce to exclude Sabbatarians from employment constituted so serious a threat to their religious freedom as to require Congressional action, applicable to all employers alike, preventing such an exclusion. In this respect, the 1972 amendment stands on the same footing as the basic provision in the 1964 Act prohibiting discrimination based on religion. That provision also finds support in the power of Congress to protect the free exercise of religion, just as the prohibition of racial discrimination finds support in the power of Congress to implement the Fourteenth Amendment.

The trend of this Court's decisions in recent years has been toward broad interpretation and application of the Free Exercise Clause.[3] Thus, in *Sherbert* v. *Verner,* 374 U.S. 399 (1963), the Court held that a denial of unemployment compensation benefits to a worker who, like respondent herein, could not conscientiously accept employment that required her to work on Saturday, violated the Free Exercise Clause. In the case of *In re Jenison,* 375 U.S. 14 (1963), the Court held that a woman whose religious conscience forbade her from serving on juries because it would violate the Biblical command, "Judge not that ye be not judged," could not, consistent with the Free Exercise Clause, be held in contempt of court. And in *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), the Court held that the Free

3. For a fuller development of this point, we respectfully refer the Court to Pfeffer, The Supremacy of Free Exercise, 61 Georgetown L. Rev. 1115 (1973).

Exercise Clause forbade prosecution under a state's compulsory school attendance law of Amish parents whose religious consicence would not allow them to send their children to secondary schools.

We submit that equal liberality in the interpretation of the First Amendment is called for when the Court passes on the validity of a Congressional enactment which has both the intent and effect of protecting the free exercise of religion. In such a case, the classic words of John Marshall in *McColluch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819), are particularly appropriate:

> . . . Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

The conclusion we urge here was reached in *Jordan* v. *North Carolina National Bank,* 399 F. Supp. 172, 179-80 (W.D.N.C. 1975), a well-reasoned decision that we commend to the Court's attention. In the last paragraph of that part of the District Court's opinion which deals with the Free Exercise claim, the Court said:

> Congress, as evidenced by the debates relating to the 1972 Amendments to Title VII felt §2000e(j) furthered First Amendment freedoms. Senator Harrison Williams in discussing §2000e(j) quoted the pertinent portion of the First Amendment and stated "In dealing with the free exercise thereof, really, this [i.e., §2000e(j)] promotes the constitutional demand in that regard." "Legislative History of the Equal Employment Opportunity Act of 1972", p. 715.

TWA seeks to distinguish *Sherbert* v. *Verner* on the ground that in the present case the District Court "found that it was 'coincidental' that the applicable seniority system, and hence employment relationship, acted to compound Hardison's problem in exercising his religion" (TWA Brief, p. 33). We are unable to see how the situation in *Sherbert* was less "coincidental" or more a direct violation of the Free Exercise Clause than the situation in the present case.

Nor are we able to appreciate the cogency of the other grounds suggested in the TWA brief (in footnote 18 on p. 34) for distinguishing *Sherbert*. First, it notes that "the state statutory scheme there at issue was not evenhandly applied in that it actually and affirmatively discriminated against Saturday as contrasted to Sunday worshippers," whereas in the present case "the seniority provision was uniformly applied." We suggest, however, the fact that TWA may be violating the Free Exercise rights of Sunday observers does not constitutionally justify its violation of those rights in respect to Sabbatarians.

TWA argues further that "the plaintiff would have been 'destitute' in *Sherbert;* whereas Hardison plainly could seek out employment not requiring Saturday work." We are unaware of any authority to support the proposition that the Free Exercise Clause protects only the destitute, and we take note that, if Section 701(j) and the regulation are voided, Hardison and others like him will in fact be threatened with destitution because of difficulties in finding employment consistent with their religious principles.

"Finally," the TWA brief argues, "in *Sherbert,* unlike here, no other person's rights would be directly and ad-

versely affected by denial [*sic,* "granting" was probably intended] of benefits." This assertion is hardly accurate. The granting of benefits to Mrs. Sherbert certainly affected to some extent the claimed rights of the employer and the taxpayers whose enforced contributions went to pay her benefits. Translating *Sherbert* into the terms of the statute and regulation in issue here, granting Mrs. Sherbert unemployment benefits did not impose "undue hardship" upon employers or taxpayers.

As it did in *Sherbert,* this Court in the case at bar must protect respondent Hardison from the needless requirement of choosing between gainful employment and following the religious dictates of his conscience. To do less would be to deny the principle of religious liberty which drew the earliest settlers to our shores.

For the Establishment and the Free Exercise Clauses of the First Amendment are nothing more than the two sides of that principle of religious liberty upon which our Republic was founded.

Conclusion

It is respectfully submitted that, for the reasons stated above, this Court should affirm the ruling of the court below upholding the constitutionality of §701(j) of the Civil Rights Act of 1964, as amended, and EEOC Guideline 1605.1.

Respectfully submitted,

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